SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases — Page

Statutes

Textbooks Page

IN THE

Supreme Court of the United States

October Term, 1970
No. 84

UNITED STATES OF AMERICA,

Appellant,

vs.

MILAN VUITCH, M.D.,

Appellee.

On Appeal From the United States District Court for the District of Columbia.

Motion for Leave to File Brief Amicus Curiae in Support of Appellee.

The National Legal Program on Health Problems of the Poor hereby respectfully moves the Court for leave to file its attached brief *amicus curiae* in support of appellee in the above-entitled matter.

The National Legal Program on Health Problems of the Poor is a law reform center sponsored and funded by the U.S. Office of Economic Opportunity to provide support for OEO Legal Services programs across the country in cases involving health problems of the

poor and to provide, through education, research and legal representation, assistance in the preparation of important litigation in health law. The Program is based at the University of California, Los Angeles, School of Law.

The Program believes that restrictive American abortion laws, such as the District of Columbia statute under attack in this action, have a particularly severe impact on the nation's poor and non-white populations. It is the poor and non-white who suffer the most from limited access to legal abortion, and it is they who incur greatly disproportionate numbers of deaths and crippling injuries as a result of being forced to seek criminal abortion. This is the first case to reach the U.S. Supreme Court on the merits of such a restrictive law under the Constitution, and for these reasons the Program is critically interested in the result.

Recognizing that there are a number of grounds for constitutional challenge to the abortion law here under review, the Program, due to the nature of its law reform responsibility, restricts the attached brief to the particular impact of this law on the poor and non-white, and contends that this impact is such as to deny the poor and non-white equal protection of the laws under the due process clause of the Fifth Amendment.

It is the Program's understanding and belief that the principal briefs for appellee will not dwell in any detail on this aspect of the constitutional infirmities

charged, and the Program believes therefore that the equal protection analysis and issues raised in its brief will not be repetitious of other arguments.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE.

Summary of Argument.

It is an undeniable fact that abortion in the District of Columbia and in the United States is far more readily available to the white, paying patient than to the poor and non-white. Studies by physicians, sociologists, lawyers and public health experts all reach this same conclusion. The reasons for it are not purely economic, that abortion is an expensive commodity to obtain on the medical marketplace, and it is therefore to be expected that the rich will have easier access to it. The reasons are also that in the facilities which provide free health care for the poor, such as D.C. General Hospital, abortion is simply not made available to the poor and non-white on the same terms and conditions as for the paying patients. The poor know this, and seek criminal abortion, with its resulting high toll of death and infection in vastly disproportionate numbers.

These circumstances are brought about by the existence of restrictive laws, such as D.C. Code §22-201, whereby the legislature has made lay judgments about what conditions must exist before abortion can be legally performed, and has delegated the authority to make such decisions to physicians and committees of physicians under vague standards, with the threat of felony punishment to the physicians if they err on the side of granting abortion. The poor and non-white are unable to shop for doctors and hospitals who will favor

their applications, are unable to obtain the necessary consultations to establish that their conditions qualify them for the treatment and must largely depend on the sympathy of public hospitals and public hospital doctors, with whom they have no personal relationship, and which operate under the government's eye, for the relief they seek. The results, and the statistics of discrimination, are plain.

A woman who seeks abortion and the doctor who desires to give it are asserting certain fundamental rights which have constitutional protection. Among these are the rights to marital, sexual and family privacy and sanctity, the right to choose whether to bear children and the physician's right to practice ethical medicine. These rights are abridged by the state's prohibition on abortions, save in limited, vaguely defined circumstances. In light of that abridgment, the state must demonstrate a compelling interest for its anti-abortion statute.

The state's interest that the woman's health be protected has been rendered obsolete by medical science, which now performs abortions more safely than it brings a mother through pregnancy and childbirth.

The state's interest in discouraging illicit sexual relationships could be better served by laws forbidding these relationships, and not by the indirect and overly broad prohibition on abortion. There is no evidence that the abortion laws deter ilicit sexual relationships in any case.

The state's interest in expanding the population lacks any viability today; government policy in all other fields is ranged against it. This interest, if it is one, could be better served by a prohibition on contraception, which probably would be unconstitutional under prior cases.

The state's interest in affording the fetus a constitutional right to life is not supported in the Constitution or in common law.

Absent a compelling state interest, the harsh and adverse discriminatory effect on the poor and non-white in the operation of the D.C. abortion law denies to the poor and non-white the equal protection of the laws, in violation of the due process clause of the Fifth Amendment.

ARGUMENT.

I.

THE APPLICATION AND EFFECT OF THE DISTRICT OF COLUMBIA ABORTION LAW RESULTS IN DISCRIMINATION AGAINST THE POOR AND THE NON-WHITE IN THE PROVISION OF NECESSARY MEDICAL CARE, DENYING TO THE POOR AND NON-WHITE THE EQUAL PROTECTION OF LAWS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

A statute which is not on its face discriminatory, nor perhaps even intended by the legislature to establish unreasonable classifications among persons, may nevertheless unconstitutionally deny to certain groups the equal protection of the laws by its application and effect. See, *e.g., Yick Wo v. Hopkins,* 118 U.S. 356; *Harper v. Virginia Bd. of Elections,* 383 U.S. 663.

The clear method of application and effect of American abortion laws, and here of the District of Columbia statute, D.C. Code §22-201, is to deny to poor and non-white citizens the equal protection of the laws to which they are entitled under the due process clause of the Fifth Amendment. While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process,' *Schneider v. Rusk,* 377 U.S. 163, 168; *Bolling v. Sharpe,* 347 U.S. 497; *Shapiro v. Thompson,* 394 U.S. 618, 642.

A. The Application and Effect of the D.C. Abortion Law Results in Discrimination Against the Poor and Non-White in the Provision of Necessary Medical Care.

There is, basically, a total prohibition in the District of Columbia against the performance of an abortion by anyone, physicians included, except when necessary to preserve the mother's life or health. D.C. Code §22-201.

On its face, the classification provides relief for all those whose lives or health are similarly in need of preservation, and excludes from relief all others.

There is, therefore, a certain category of legally obtainable abortions in the District of Columbia, and presumably a certain group of women who qualify according to life or health threatening conditions, and not according to race or socioeconomic status. When a pregnant woman presents herself to a doctor in such condition that he can medically predict that abortion is necessary to preserve her life or health, then it follows that abortion should be the prescribed treatment. There is nothing demonstrable in the differences of skin color or economic condition that would suggest a substantially smaller proportion of the non-white or the poor would fall into this category as opposed to the white or wealthy.

Yet it has been demonstrated that the non-white and poor do not receive this medical treatment as they need it and thus suffer a particularly harsh and adverse effect from the operation of the statute. The public hos-

pital in the District of Columbia is notorious for sharply limiting and imposing onerous conditions on this service to the detriment of the poor who rely on it for virtually all medical services. See, *e.g., Doe v. Gen'l. Hosp. of the District of Columbia,* .... F. 2d ...., 38 U.S.L.W. 2540 (C.A.D.C. 1970). It is only typical, however:

> According to most investigators the private patient is much more likely to have a legal interruption of pregnancy than is the ward patient . . . At the opposite extreme, one finds reputable [private] hospitals permitting abortion for one of every thirty-five to forty deliveries. The variation in the hospitals surveyed . . . extended from no abortions in 24,417 deliveries to one in thirty-six deliveries. It seems inconceivable that medical opinion could vary so widely. Socioeconomic factors must be playing a major role in the decision to abort . . . Niswander, "Medical Abortion Practices in the United States," 17 *W. Res. L. Rev.* 403, 417-19 (1965).
>
> While socioeconomic conditions never *per se* legally warrant therapeutic abortion, socioeconomic status nevertheless frequently determines whether or not an abortion will be performed, whether that self-same abortion will be therapeutic or criminal. Rosen, "Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy," 17 *W. Res. L. Rev.* 435, 450 (1965).
>
> The rich and the poor, it should be noted, are not treated alike: many ethical physicians, for instance, are much more lenient in their application of indications for therapeutic abortion to private

patients than to indigent patients on municipal hospital services. It is the 'private practice' patient, therefore, who can more readily obtain a therapeutic abortion. Kleegman, "Planned Parenthood: Its Influence on Public Health and Family Welfare" in Rosen (ed.), *Abortion in America* 254, 256 (1967).

Perhaps the greatest injustice resulting from our present policies is the creation of a double standard for private and indigent patients . . . Almost universally greater consideration is extended to the private patient for a multitude of reasons which, not infrequently, include a recognition of their social and economic prestige. Mandy, "Reflections of a Gynecologist," in Rosen (ed.), *Abortion in America,* 288-89 (1967).

A prominent national expert in the field, Dr. Robert Hall, has observed that:

> One predictable result of the restrictive laws in the United States is that most hospital abortions here are obtained by white upper-class women. One illustrative statistic should suffice: the therapeutic abortion to term birth ratio in the private hospitals in New York City is 1:250; in the municipal hospitals, 1:20,000. Hall, "Abortion Laws: A Call for Reform," 18 *De Paul L. Rev.* 584 (1969).

Dr. Hall also surveyed 65 "outstanding American Hospitals" and discovered that "the incidence of therapeutic abortion is strikingly higher on the private services than on the ward services," noting that the private service rate averaged 3.6 times higher. Hall, "Therapeutic Abortion, Sterilization and Contraception," 91 *Am. J. Obst. & Gynec.* 518, 519 (1965).

Although it is clear that the availability of abortion to white and paying patients has always been greater, a study by Dr. Edwin Gold, reveals that this disparity has been widening over the years. *Gold, et al.*, "Therapeutic Abortions in New York City: A 20-Year Review," 55 Am. J. Pub. Health, 964, 968 (1965). One reason for this may be found in the general advancement of medical science and what has been termed the shrinking non-psychiatric indications for abortion. Guttmacher, "The Shrinking Non-Psychiatric Indications for Therapeutic Abortion" in Rosen (ed.), *Therapeutic Abortion* 12 (1954).

Dr. Hall suggests that:

> . . . this discrepancy may be attributed to the higher incidence of abortions for psychiatric indications among private patients. Whereas at Sloane Hospital [for Women, in New York City] one therapeutic abortion was performed for psychiatric reasons per 1,149 deliveries on the ward service, the comparable ratio for the private service was one per 104. . . . It would appear therefore that private patients with unwanted pregnancies are more often referred for primary psychiatric evaluation and/or that psychiatric justification for abortion is more easily obtained for private patients. Hall, "Thereapeutic Abortion, Sterilization and Contraception," 91 *Am. J. Obst. & Gynec.* 518, 519, 522 (1965).

Thus, if a charity ward or municipal hospital indigent patient is to receive an abortion, it must usually be for observable physical conditions which, as Dr. Guttmacher points out, have declined in importance

as indicia for abortion. Dr. Mary Calderone notes in her study that:

> . . . high proportions of therapeutic abortions because of mental conditions may be noted among private patients whether in private or voluntary hospitals. For municipal hospital patients infective and parasitic diseases (mainly tuberculosis) take the lead, as they do among the general service patients in voluntary hospitals. Calderone (ed.), *Abortion in the United States* 78, 80 (1958).

Dr. Hall's survey of 65 major hospitals confirms the same wide discrepancy in granting psychiatrically-related abortions. Hall, *op. cit.* at 518.

In the 1940's, when the majority of abortions were done for medical (non-psychiatric) reasons, the incidence on ward and private services was about the same. In the 1950's, when medical reasons accounted for fewer abortions, the incidence of all abortions on the private services rose to twice that of the ward service. In the 1960's, when the number of abortions for psychiatric reasons rose dramatically, the incidence of all abortions on private services soared to better than twenty times greater than that of the clinic service. Niswander, *op. cit.* at 419.

The reason for this, as Rosen has stated is that

> . . . by the very nature of things, ward patients are less likely to have the necessary consultations requested, including the psychiatric, and to have the necessary recommendations made and accepted by a hospital board, than are their well-to-do sisters. Ethical and conscientious physicians decry

> this fact, but nevertheless find it impossible to controvert . . . Our present state statutes keep the poor, not the rich, from obtaining abortions. Rosen, "A Case Study in Social Hypocrisy," in Rosen (ed.), *Abortion in America* 299 (1967).

It strains credulity to accept such discrepancies as due to natural factors, such as fewer life-threatening conditions among the pregnant poor or non-white whether psychiatric or physical, or an essentially different moral code respecting abortion among the poor and non-white.

Indeed, maternal mortality tables show that poor and non-white women seek abortion, albeit so-called "criminal" abortion, in large numbers. In their New York study, Drs. Gold, *et al., op. cit.* at 970-71, noted that the ratio of criminal abortion deaths per 1000 live births was 4.0 for white women, 8.5 for Puerto Ricans and 16.2 for non-whites. Indeed, criminal abortion is the greatest single cause of maternal mortality in the United States, besides being one of the greatest causes of disease, infection, and resultant crippling and sterilization. See Leavy & Kummer, "Criminal Abortion: Human Hardship & Unyielding Laws", 35 *So. Cal. L. Rev.* 123 (1962); see also *People v. Belous,* 458 P. 2d 194, 200 (Cal. Sup. Ct. 1969), *cert. den.,* 397 U.S. 915.

California, the only state known to officially compile such figures, in its most recent published report notes that approximately 7 percent of that state's non-white female population subjected themselves to criminal abortion in 1968, as opposed to only 1½ percent of the state's white female population. California

Dept. of Public Health, *Third Annual Report on the Implementation of the California Therapeutic Abortion Act*, Tab. 4 (1970).

B. Where Congress Has Permitted Abortions to Take Place Under Certain Conditions but Has in Effect Delegated Broad Authority, Without Standards, to Physicians to Determine Eligibility for an Abortion Under Conditions Likely to Result and in Fact Resulting in Discrimination Against the Poor and Non-White Populations, With Regard to Fundamental Personal Rights Involving Life Itself and the Privacy and Sanctity of the Family, Congress Has Contravened the Due Process Clause of the Fifth Amendment.

As Congress has created a protected class of women, it has delegated its authority to determine who falls into this class, and under what life or health-threatening circumstances, to physicians and hospital committees made up of physicians. Hospital committees must approve abortions according to universal hospital practice. See Lader, *Abortion* 26-27 (1966).

This delegation of authority has not been made under what might be called "reasonably fixed statutory standards," which would leave the physicians and their committees with a minimum of discretion in deciding which women would be eligible for abortions under fact situations which clearly fit articulated statutory criteria. See *R. H. Johnson & Co. v. S.E.C.*, 198 F. 2d 690, 695 (2d Cir. 1952). Rather, the decision-making power delegated is under a virtually meaningless and vague standard of what is "necessary for the preservation" of the mother's life or health, an expression struck down as unconstitutionally vague by the

California Supreme Court in *People v. Belous, supra.* The Court said:

> The inevitable effect of such delegation may be to deprive a woman of an abortion when under any definition [of 'necessary to preserve' clause] she would be entitled to such an operation, because the state, in delegating the power to decide when an abortion is necessary, has skewed the penalities in one direction: *no* criminal penalties are imposed where the doctor refuses to perform a necessary operation, even if the woman should in fact die . . . The pressures on a physician to decide not to perform an absolutely necessary abortion are . . . enormous . . . 458 P. 2d at 206.

Aside from considerations of constitutional infirmities caused by vagueness or by exclusion of other classes of women from abortion for medical reasons, the delegation of decision-making power, with regard to critical interests or fundamental liberty, to an individual with a pecuniary or personal interest in the decision, is a violation of the due process clause. *Tumey v. Ohio,* 273 U.S. 510, 523. In the case of abortion, the woman's physician and the physicians on the hospital committee have a "direct, personal, substantial, pecuniary interest in reaching a conclusion" that the woman not have an abortion. *People v. Belous, supra* at 206. A delegation of authority to a group with such a substantial personal interest is unconstitutional. See also *Group Health Insurance of New Jersey v. Howell,* 193 A. 2d 103 (N.J. Sup. Ct. 1963).

Furthermore, the decision-making process under this delegation of authority has all the aspects of a star

chamber proceeding. Time is obviously of the essence in considering an application for abortion, and there is no appeal from an abortion committee's decision. The decision is made in private, with no provision for personal appearance by the applicant. See Lader, *Abortion* 26-30 (1966). And in this situation the question to be decided, under the statute, is one of life or death, the most fundamental of all human rights. In *Tumey v. Ohio, supra,* authority had been delegated to magistrates to impose jail sentences and fines, deprivations of liberty, even though the magistrates had a pecuniary stake in the outcome of the case. It was this delegation to financially interested magistrates that this Court found unconstitutional. In abortion, the delegation governs the right to life, and even then is skewed heavily against making that decision in favor of the woman's life. *People v. Belous, supra* at 206.

There are other fundamental personal rights at stake in the decision to grant or not to grant an abortion. The integrity of marriage and the family, and the relationship of child and parent are subject to serious disruption by negative abortion decisions. Thus in *Skinner v. Oklahoma,* 316 U.S. 535, this Court said:

> We are dealing with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. *Id.* at 541.

This Court in *Griswold v. Connecticut,* 381 U.S. 479, reaffirmed the compelling personal interest in the freedom of marriage, marital privacy and limiting family size.

In *Levy v. Louisiana,* 391 U.S. 68, this Court spoke very strongly of family integrity:

> In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature to make classifications . . . However that might be, we have been extremely sensitive when it comes to basic civil rights (*Skinner v. Oklahoma, supra,* at 541; . . .). The rights asserted here involve the intimate, familial relationship between a child and his own mother. 391 U.S. at 71.

So also in *Meyer v. Nebraska,* 262 U.S. 390, the Court struck down a statute requiring all families to educate their children in a particular manner since the law infringed the fundamental "right of the individual . . . to establish a home and bring up children." *Id.* at 399.

Thus, the rights to family sanctity, the personal decision to devote one's life and resources to children already in being, to prevent the birth of a rubella-deformed infant who will burden the family and affect the lives of normal siblings, the decision to limit family size as well as the right of the woman to life itself are all subject to invasion in the delegated authority held by these physicians and committees. Where a statute neutral on its face affects these fundamental rights of life, the choice of motherhood and the sanctity of the family, by conferring broad decision-making powers without adequate standards upon a group of individuals with compelling economic and other reasons to make their decision against protecting these rights, then that statute is unconstitutional.

Where a non-white, poor woman is in need of abortion, the delegation of this authority results in denial of equal protection, because the poor woman is restricted by her economic circumstances to seeking abortion in a public indigent care hospital or some other charity ward. Nothing in the law or common medical practice prevents a wealthy woman from consulting with any doctor and going to any hospital most likely to provide the desired treatment.

The denial of abortion to poor women by publicly-employed physicians in public hospitals has the effect of a decision *res judicata*. The more affluent woman may shop among hospitals and doctors until she finds those who will favor her application, even if it has been rejected elsewhere.

> The most disastrous result of the abortion committee system has been the economic and social discrimination against one group—the ward patients. In large cities the poor, particularly Negroes and Puerto Ricans, are virtually denied the same medical care as the privileged few. Lader, *Abortion* 29-30 (1966).

The abortion practices of public hospitals and voluntary charity wards cited above, as compared with the same practices in private hospital services, reflect the discriminatory result of this delegation of authority. Thus, in effect, a denial of equal protection results when a statute conferring a right to an abortion upon certain kinds of women operates to confer decision-making authority as to the rich upon numerous abortion-

providers, but in effect results in limiting decision-making authority as to the poor to one or a very few lawful abortion providers with substantial and compelling interests which impair their ability to decide impartially whether a woman is entitled to an abortion. *Griffin v. Illinois,* 351 U.S. 12; *Hobson v. Hansen,* 269 F. Supp. 401 (D.D.C. 1967), aff'd *sub nom. Smuck v. Hobson,* 408 F. 2d 175 (D.C. Cir. 1969); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663.

C. Where Fundamental Rights Relating to Life, the Right to Choose Not to Bear Children, the Right to Marital and Sexual Privacy, and the Rights Relating to Family Sanctity Are Impaired by the Discrimination in Operation of the Abortion Statute, Having a Particularly Severe Impact on the Poor and Non-White, in Absence of a Compelling State Interest, the Statute Denies Equal Protection in Violation of the Due Process Clause of the Fifth Amendment.

1. Fundamental Rights Abridged.

The Supreme Court has identified certain fundamental rights which cannot be discriminatorily conferred or denied by government. Among these are the right to vote (*Harper v. Virginia Bd. of Elections, supra*); the right to procreate (*Skinner v. Oklahoma, supra*); the right to equal access to appeal from a criminal conviction (*Griffin v. Illinois, supra*) the right to education (*Brown v. Board of Education,* 347 U.S. 483); the right to travel freely (*Edwards v. California,* 314 U.S. 160; and *Shapiro v. Thompson,* 394 U.S. 618). Of these cases, *Brown* was a racial discrimination and the others, except *Skinner,* were discriminations that primarily affected the poor.

Whether one or all of the rights asserted here is considered, *amicus* argues that each is of equal standing with those the Constitution has heretofore been held to protect as fundamental. In fact, each has been recognized as a fundamental right in other cases.

The California Supreme Court in considering and upholding a challenge to an abortion law almost identical to the D.C. statute, declared that the private interests involved were "the woman's right to life and . . . the fundamental right of the woman to choose whether to bear children." *People v. Belous, supra* at 199. The right to marital or sexual privacy was upheld in *Griswold v. Connecticut, supra*. The right to choose not to procreate would seem simply the obverse of the right to procreate in *Skinner v. Oklahoma, supra*.

The sanctity of the family is clearly involved. A woman forced to bear an unwanted child by the statute has her rights, and those of her husband and family, to decide on the size of the family, to apply the limited resources of the family to the upbringing and support of existing children, to the protection of her health and her effective functioning as housewife and mother, all suborned to the state's purpose. In *Meyer v. Nebraska, supra,* the right of the family to control the education and upbringing of its children was recognized as fundamental. In *Levy v. Louisiana, supra,* the Court gave special protection to the familial relationship of parent and child. In *Griswold v. Connecticut, supra,* the Court found a very strong and overriding personal interest in the parents' decision to limit family size.

The *Griswold* case traced these personal freedoms in the sanctity of the family to "penumbral" rights, nowhere expressly granted in the Constitution. However

they may be based, they have been clearly identified and honored by the Court, and when they are denied to some but not to others by the effect and enforcement of a law, without a compelling state interest, the law has been struck down.

2. No Compelling State Interest.

This Court has recently reaffirmed that there are two categories of equal protection analysis. *Dandrige v. Williams*, 397 U.S. 471, 38 U.S.L.W. 4277. The traditional analysis inquires only into whether the classification made has a "reasonable basis," and is generally applied to areas of economic regulation. 38 U.S.L.W. 4281. Where, however, the discrimination abridges fundamental rights, the government must demonstrate a "compelling interest" in order to justify it. 38 U.S.L.W. 4281 and 38 U.S.L.W. 4292 (dissent). In applying the traditional analysis in *Dandridge*, the Court took pains to observe that it was essentially an economic benefits question. 38 U.S.L.W. 4281. The Court carefully excepted from this analysis cases wherein a fundamental constitutional right was infringed, including a right not expressly protected in the Constitution (citing *Shapiro v. Thompson*, 394 U.S. 618, the right to travel, as an example) 38 U.S.L.W. 4281, n.16. Such unexpressed, but nevertheless constitutionally protected fundamental rights are clearly at issue here, commanding the demonstration of a compelling governmental interest. This governmental interest must be shown to outweigh the individual's rights on a scale calibrated by the fundamental nature of the private interest. See "Developments in the Law—Equal Protection," 82 *Harv. L. Rev.* 1065, 1103 (1969). Thus, even if the state had some valid interest in prohibiting abortion save for this classifica-

tion of health urgencies, *amicus* contends that this interest is not of sufficient magnitude to override these fundamental private rights.

The first possible governmental interest, that strict control by the state over abortion is necessary to protect the woman's health is, of course, a justification for strict control of all surgical procedures, not just abortion. The D.C. statute places this kind of control over surgery only on abortion, which militates against the legitimacy of this interest.

When abortion laws were first adopted in this country, surgery was very dangerous. Aseptic procedures and antibiotics were unknown. Nearly 40% of patients undergoing surgery in the early 19th century died. See, *e.g.*, Ober, *Analysis of Surgical Practice at the New York Hospital, 1808-33* 19 (1970); *People v. Belous, supra* at 200-01.

Today, however, it is literally safer for a woman to have an abortion in early pregnancy than to go through childbirth. *People v. Belous, supra* at 200.

The maternal mortality rate for therapeutic abortion is 3 per 100,000; the maternal mortality rate connected with pregnancy and childbirth is 20 per 100,000. Tietze, "Mortality with Contraception and Induced Abortion," 45 *Studies in Family Planning* 8 (1969).

On the other hand, women who cannot obtain therapeutic abortions because of the law are driven to criminal abortionists where the mortality and morbidity rates are astronomical. See, *e.g.*, Moritz and Thompson, "Septic Abortion," 95 *Am. J. Obst. & Gynec.* 46 (1966); Reid, "Assessment and Management of the Seriously Ill Patient Following Abortion,"

99 *J.A.M.A.* 805 (1967). Indeed, abortion restrictions designed "to protect women from serious risks to life and health [have] in modern times become a scourge." *People v. Belous, supra* at 201.

Any justification for abortion laws based on protecting the woman's health has long since been rendered obsolete by medical science, and no compelling state interest in this justification can possibly remain.

Next, it has been contended that restrictions on abortion discourage sexual promiscuity and thus enhance public morality. The best answer to this contention is that the government has more direct means to regulate fornication, adultery, incest and prostitution. Not only is there no evidence that a prohibition on abortion deters this kind of behavior, the existence of a prohibition unlimited to these circumstances sweeps too broadly, prohibiting as it does abortion for an unwanted pregnancy occurring in wedlock as well as that resulting from an illicit relationship. A statute challenged as an invasion of constitutional rights must not have such overbreadth that it forbids legitimate acts as well as illegitimate ones. *NAACP v. Alabama,* 377 U.S. 288; *Shelton v. Tucker,* 364 U.S. 479; *Thornhill v. Alabama,* 310 U.S. 88.

There is no compelling government interest in the protection or encouragement of public (or private) morality in the District of Columbia abortion statute as drawn.

A third possible government interest is in encouraging population growth. The harshest anti-abortion laws existed in societies with an overriding interest in producing soldiers for military conquest, as in ancient

Sparta and Nazi Germany. See Leavy & Kummer, "Criminal Abortion: Human Hardship and Unyielding Laws." 35 *So. Cal. L. Rev.* 123 (1962).

The government cannot seriously contend that the restrictions on abortion are justified by an overriding public interest in increasing the population of the District of Columbia or anywhere else today. See Ehrlich, *The Population Bomb* (1968). It is accepted government policy today to limit family size and encourage family planning. See, *e.g.*, Title V of the Social Security Act, 42 U.S.C. §502. If this were a legitimate interest, Congress might attack the problem more directly by forbidding the prescription, sale and use of contraceptives, and it has been held that the government may not constitutionally do so. *Griswold v. Connecticut, supra; Baird v. Eisenstadt,* .... F. 2d ...., 39 U.S.L.W. 2013 (1st C. 1970).

Finally, it is suggested that the government has a compelling interest in protecting the rights of the embryo or fetus. In fact, however, the fetus has no constitutional right to live or to be born that the state may protect against the woman's exercise of her own fundamental rights.

A primary argument against the existence of the fetus' "right to life" is the abortion statute itself. If there is such a right, may the District of Columbia constitutionally abridge it when the fetus may endanger the woman's life or health?

The Fourteenth Amendment confers citizenship on "all persons *born* or naturalized . . ." (emphasis added). Neither is there support for such a right in common law, where abortion was not even a crime before quick-

ening of the fetus. See, *e.g., State v. Cooper,* 22 N.J.L. 52 (1849).

It is argued that the fetus enjoys certain rights respecting the inheritance or devolution of property, and of suing to recover for pre-natal injuries it has suffered, and that these help establish the right to life. On the contrary, all such rights exist only in contemplation of live birth, or are rights which are reflections of the parents' interests. See, *e.g., Carroll v. Skloff,* 202 A. 2d 9 (Pa. Sup. Ct. 1964) (ownership of property wholly dependent on live birth); *Prosser on Torts* 356 (1964) (may sue for prenatal injuries "provided he is born alive"); *People v. Belous, supra* at 202 ("all of the statutes and rules relief upon [to support the right to life] require a live birth or reflect the interest of the parents").

One recent case seems to go further than any other in establishing a fetus' right to life. In *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson,* 201 A. 2d 537 (N.J. Sup. Ct. 1964), a woman had refused a blood transfusion on religious grounds, although this would have caused destruction of her fetus. The court ordered that the transfusion be given in order to save the fetus. A distinction that may be drawn between that case and a statute such as the one under consideration here, which prohibits abortion at any time during gestation, is that in *Raleigh* the fetus had quickened. This distinction was important to the three judge Federal court in the recent Wisconsin abortion case, as the court said:

> The police power of the state does not, however, entitle it to deny a woman the basic right reserved to her under the Ninth Amendment to de-

cide whether she should carry or reject an embryo *which has not yet quickened.* (Emphasis added.) *Babbitz v. McCann,* 310 F. Supp. 293, 302 (E.D. Wis. 1970).

Another distinction may be drawn from the *Raleigh* case. As the *Belous* court indicated, the "rights" of the fetus asserted there either contemplated live birth or reflected the interest of the parents. 458 P. 2d at 202. In *Raleigh* the woman's interest certainly was that the child live. The pregnancy was not unwanted nor medically contraindicated. The woman as a person, as a marriage partner, as part of a family unit, desired that the child be born alive. The woman was not asserting a right to choose not to bear the child; rather, this consequence was ancillary and undesirable to her. In the abortion situation, however, the interests of the woman and the fetus are contrary. The woman is seeking to assert her rights to personal, marital, sexual and family privacy and integrity, claiming that continuing to bear the fetus itself is a direct threat to those rights. The latter being the contentions made here, the fetus' "rights" may be viewed differently than in the *Raleigh* context.

People v. Belous, supra, Babbitz v. McCann, supra, Roe v. Wade, ... F. Supp. .... (N.D. Tex. 1970), *Doe v. Bolton,* ....F. Supp. .... (N.D. Ga. 1970), have all either expressly or implicitly rejected the idea that the state has any compelling interest in protecting the rights of the fetus.

Where fundamental rights of the sort in issue here are asserted, the government may not abridge their exercise absent a compelling governmental interest, without violating due process of law. *Bates v. Little Rock,*

361 U.S. 516, 527; *McLaughlin v. Florida*, 379 U.S. 184, 196; *NAACP v. Button*, 371 U.S. 415, 438; *Sherbert v. Verner*, 374 U.S. 398, 403.

It is no help to the position of the government that the D.C. statute contains an indication for abortion, *viz.*, "health", beyond that of the 19th century laws forbidding all abortions except those necessary to preserve the mother's life. See, *e.g.*, Cal. Pen. Code §§274-276, struck down in *People v. Belous, supra;* §940.04 Wis. Stats., struck down in *Babbitz v. McCann, supra.* The infringement of the woman's right to choose and of the doctor's right to practice medicine exists by virtue of Congress' imposition of any limitations on the choice, the inclusion of provisions whereby the woman's and her doctor's choice may be overruled, and the felony penalties attached to making the choice outside the statute, or making it in error under the statute. As the Wisconsin district court said:

> There are a number of situations in which there are especially forceful reasons to support a woman's desire to reject an embryo. These include a rubella or thalidomide pregnancy and one stemming from rape or incest. The instant statute [§940.04 Wis. Stats.] does not distinguish these special cases, but in our opinion, the state does not have a compelling interest even in the normal situation to require a woman to remain pregnant during the early months following her conception. *Babbitz v. McCann, supra* at 301-02.

Demonstrating no compelling state interest to justify the statute, its adverse and particularly heavy impact on the fundamental rights of the poor and non-white

is a violation of the equal protection guaranteed them by the due process clause of the Fifth Amendment.

Conclusion.

For the reasons stated above, the Court should decide that the District of Columbia abortion law, D.C. Code § 22-201, denies equal protection of the laws to the poor and non-white in violation of the due process clause of the Fifth Amendment, and should affirm the judgment below.

Respectfully submitted,

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